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SERVICE DATE - LATE RELEASE OCTOBER 27, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34561

CANADIAN PACIFIC RAILWAY COMPANY — TRACKAGE RIGHTS EXEMPTION —
NORFOLK SOUTHERN RAILWAY COMPANY

STB Finance Docket No. 34562

NORFOLK SOUTHERN RAILWAY COMPANY — TRACKAGE RIGHTS EXEMPTION —
DELAWARE AND HUDSON RAILWAY COMPANY, INC.

Decided: October 27, 2004

In a decision served on October 7, 2004, the Board issued a housekeeping stay of the effective dates of the exemptions in these proceedings until October 27, 2004, to allow for review of certain documents, filing of petitions to revoke, and the Board's consideration of the stay request.¹ On October 25, 2004, Samuel J. Nasca, on behalf of the United Transportation Union - New York State Legislative Board (UTU-NY) and the Brotherhood of Locomotive Engineers and Trainman, a division of the Rail Conference of the International Brotherhood of Teamsters (BLET) filed petitions to revoke the exemptions in each proceeding.²

BACKGROUND

By separate notices filed in these proceedings on October 1, 2004, pursuant to 49 CFR 1180.2(d)(7) and 1180.4(g), Norfolk Southern Railway Company (NSR) and Canadian Pacific Railway Company (CPRC) invoked the Board's class exemption to obtain Board authorization of certain trackage rights. Under the class exemption procedures, the notices would become effective on October 8, 2004 (7 days after they were filed).

CPRC invoked the class exemption to acquire, by assignment from its affiliate, Delaware and Hudson Railway Company, Inc. (D&H), overhead trackage rights over the following lines in Buffalo, NY: (1) NSR's Southern Tier Line at milepost 413.0± and the western end of the Southern Tier Line at milepost 419.8± (including tracks into NSR's Bison Yard), a distance of approximately 6.8 miles; (2) NSR's Bison Running Track between the point of connection with

¹ These proceedings have not been consolidated and are being dealt with here in one decision solely for administrative convenience.

² The petitions to revoke will be addressed in a separate decision.

the Southern Tier Line at milepost 419.8± and the point of connection with the lines of CSX Transportation, Inc. (CSXT), at milepost 423.3±, a distance of approximately 3.5 miles; and (3) NSR's Howard Street Running Track between the point of connection with the Bison Running Track at milepost 420.15± and the point of connection with the lines of CSXT at milepost 422.3±, a distance of approximately 2.15 miles, for a total distance of approximately 12.45 miles in Buffalo, NY. NSR has informed the Board that this transaction will not take place until the effective date of any required Board approval of the petition for exemption filed by D&H in STB Docket No. AB-156 (Sub-No. 25X), Delaware and Hudson Railway Company — Discontinuance of Trackage Rights Between Lanesboro, PA and Buffalo, NY in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY, filed on October 1, 2004 (D&H petition for exemption).

NSR invoked the class exemption to acquire, from D&H, overhead trackage rights over the following lines: (1) between milepost 37.10± of D&H's Canadian Main Line in Saratoga Springs, NY, and the point of connection between D&H's Canadian Main Line and D&H's Freight Main Line at CPF 480, located at milepost 21.70± of D&H's Canadian Main Line, a total distance of approximately 15.4 miles; (2) D&H's Freight Main Line between milepost 480.36± and milepost 611.15± in Binghamton, NY, a distance of approximately 130.79 miles; and (3) D&H's Freight Main Line between milepost 611.15± and milepost 620.20± (including tracks into and within D&H's East Binghamton Yard) in Binghamton, NY, a distance of approximately 9.05 miles, for a total distance of approximately 155.24 miles. NSR will commence service on a date mutually agreed upon in writing between NSR and D&H, but not prior to the effective date of the notice.

In the D&H petition for exemption, D&H seeks authorization to discontinue rail freight operations via trackage rights over the following lines between Binghamton and Buffalo, NY: (1) NSR's line between milepost 189.8± in Lanesboro, PA, and CP Coles at milepost 210.9± in Binghamton, NY; (2) NSR's Southern Tier Line between milepost 217.0± in Binghamton, NY, and milepost 419.8± in Buffalo, NY; (3) NSR's Bison Running Track between the point of connection with the Southern Tier Line at milepost 419.8± and the point of connection with the lines of CSXT at milepost 423.3± in Buffalo, NY, a distance of approximately 3.5 miles; and (4) NSR's Howard Street Running Track between the point of connection with the Bison Running Track at milepost 420.15± and the point of connection with the lines of CSXT at milepost 422.3±, a distance of approximately 2.15 miles, for a total distance of approximately 12.45 miles in Buffalo, NY.

By petition filed on October 5, 2004, UTU-NY requests that the Board stay the implementation of the notices of exemption pending disposition of its forthcoming petitions to revoke, and pending disposition of the D&H petition for exemption to discontinue operations between Buffalo and Binghamton, NY. By petition filed on October 7, 2004, the United Transportation Union also seeks a stay of the effectiveness of the trackage rights exemptions in these proceedings and incorporates by reference the petition for stay filed by UTU-NY. In its

October 25 petition BLET also asks that we stay the notice of exemption in STB Finance Docket No. 34562 because the above transactions are interrelated and part of a larger corporate restructuring that the Board should not allow to be implemented in pieces.³ On October 26, 2004, the railroads filed replies to BLET's stay request.

As grounds for the stay, UTU-NY maintains that (1) its requests for revocation are likely to succeed on their merits and (2) employees will be irreparably injured if NSR and CPRC are allowed to implement their trackage rights without the prior labor agreements required under New York Dock Ry. — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). UTU-NY maintains that the two notices are part of a larger series of transactions memorialized in a single Memorandum of Understanding (MOU) which also embraces D&H's proposed discontinuance of service between Buffalo and Binghamton, in addition to several haulage arrangements and trackage rights between other points. UTU-NY asserts that the MOU must be made part of the record because it evidences a significant transaction for carrier consolidation under 49 U.S.C. 11323(a)(2) that would require the labor protective conditions available under New York Dock. BLET did not address the stay criteria.

CPRC and D&H, jointly, and NSR filed replies in opposition to the UTU-NY petition for stay on October 6, 2004. Both replies state that there is no basis for staying the effective dates of the exemptions. According to the railroads, the transactions will not cause irreparable injury to UTU-NY employees. Moreover, NS asserts that the MOU has been superseded by the trackage rights agreements themselves and other agreements, and therefore, has no further effect. CPRC and D&H simply assert that the MOU is irrelevant.

In the decision served on October 7, 2004, CPRC, D&H, and NSR were ordered to file the MOU, and any other documents updating the MOU, with the Board by October 12, 2004, and they have done so.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioners are likely to prevail on the merits; (2) whether petitioners will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal

³ BLET states that there is no need to request a stay in STB Finance Docket No. 34561 because CPR has stated that it will not proceed until the Board has acted on the D&H petition for discontinuance.

Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). Because the petitioners have not satisfied the standards for a stay, their stay petitions will be denied.

UTU-NY has not shown that there is a strong likelihood that it will prevail in its petition for revocation of the exemptions. Petitioner appears to argue that the two notices of exemption are part of a larger series of transactions memorialized in the MOU that would involve a significant transaction for carrier consolidation under 49 U.S.C. 11323(a)(2), thus requiring the labor protective conditions of New York Dock. The railroads, however, assert that the MOU is not the governing document in these transactions and is in fact superseded by the agreements filed with or referenced in the notices of exemption and the petition for exemption filed with the Board. Based on a review of those documents, including the MOU, it appears that the transactions involved are routine operational agreements designed to improve the efficiency of the railroads' operations and do not involve any carrier consolidations.

Nor has UTU-NY shown that its members are likely to suffer irreparable harm in the absence of a stay. NSR states in its notice that it anticipates a net increase of at least two NSR positions as a result of this transaction and UTU-NY does not dispute this assertion. Both CPRC's and NSR's trackage rights are for overhead traffic, and will not divert any traffic currently handled by D&H. Under the trackage rights class exemption, appropriate labor protection has been imposed. As for D&H's petition for exemption to discontinue trackage rights, it also contemplates the appropriate labor protective conditions for a petition of this kind.

Under the circumstances, UTU-NY has not shown that issuance of a stay would be in the public interest. While UTU-NY asserts that the arrangements would leave shippers with only one active rail carrier in the territory served by the Southern Tier Line, D&H's petition for exemption states that the proposed discontinuance would not reduce the number of competitive rail options available to any shipper. The arrangements, as laid out in D&H's exemption, preserve D&H's commercial access to every customer that D&H can access today, as well as the right to interchange traffic with every carrier that D&H can interchange traffic with today.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The stay petitions filed on October 5, October 7, and October 25, 2004, are denied.

2. This decision is effective on its service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary